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No. 98

In the Supreme Court of the United States

OCTOBER TERM, 1936

THE UNITED STATES OF AMERICA, APPELLANT

v.

CURTISS-WRIGHT EXPORT CORPORATION, CURTISS AEROPLANE & MOTOR COMPANY, INC., BARR SHIPPING CORPORATION, JOHN S. ALLARD, CLARENCE W. WEBSTER, SAMUEL J. ABELOW, AND ROBERT R. BARR, APPELLEES.

ON APPEAL FROM THE DISTRICT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR APPELLEES, JOHN S. ALLARD, CLARENCE W. WEBSTER AND SAMUEL J. ABELOW.

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OPINIONS BELOW

The Court below rendered an opinion (R. 11) and on reargument a supplemental opinion (R. 23). They are reported in 14 F. Supp. 230.

STATUTE INVOLVED

The Statute involved is the Joint Resolution of May 28, 1934 (c. 365, 48 Stat. 811). It is in the following terms:

"JOINT RESOLUTION

To prohibit the sale of arms or munitions of war in the United States under certain conditions

Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

SEC. 2. Whoever sells any arms or munitions of war in violation of section 1 shall, on conviction, be punished by a fine not exceeding $10,000 or by imprisonment not exceeding two years, or both.

Approved, May 28, 1934."

The two proclamations issued under this Resolution are set forth in the Appendix to the Appellant's Brief, at 27-31.

SUMMARY OF THE ARGUMENT

I

The Joint Resolution of May 28, 1934, invalidly delegates legislative power to the Executive in at least four respects. First, its going into operation is made dependent upon the President's determination whether it may have the capacity to bring about the result desired by the Congress, to wit, the re-establishment of peace in the Chaco. Second, its

going into operation is further conditioned upon the President's uncontrolled discretion. Third, it delegates to the President a power to repeal the Resolution which is coordinate with that of the Congress itself. Fourth, it grants to the President the power to except from and limit the statutory prohibition, as he may see fit, guided by no rule or standard whatsoever. In each of these respects it attemps to delegate to the Executive a function which must, under the Constitution, be exercised by the Congress itself.

II

The Presidential Proclamation which was designed to put the Resolution into operation was ineffectual, because of the President's failure to find essential jurisdictional facts.

III

The acts charged in the indictment are no longer an offense against the laws of the United States. The prosecution is not saved by R. S. Section 13 and there is no other saving clause. The prosecution must therefore fail.

IV

This Court may consider all grounds urged in support of the judgment which go to the validity or construction of the Joint Resolution.

ARGUMENT.

POINT I

THE JOINT RESOLUTION OF MAY 28, 1934, CONSTITUTES AN INVALID DELEGATION OF LEGISLATIVE POWER TO THE EXECUTIVE.

The first section of the Joint Resolution of May 28, 1934, provides as follows:

"Resolved by the Senate and House of Representatives of the United States of America in Congress assembled, That if the President finds that the prohibition of the sale of arms and munitions of war in the United States to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries, and if after consultation with the governments of other American Republics and with their cooperation, as well as that of such other governments as he may deem necessary, he makes proclamation to that effect, it shall be unlawful to sell, except under such limitations and exceptions as the President prescribes, any arms or munitions of war in any place in the United States to the countries now engaged in that armed conflict, or to any person, company, or association acting in the interest of either country, until otherwise ordered by the President or by Congress.

In enacting this Joint Resolution, the Congress delegated to the President not less than four of its essential legislative functions.

1. The going into operation of the statute was conditioned upon the President's judgment as to its beneficial effect upon the restoration of peace in the Chaco . . . "* * * if the President finds that the prohibition of the sale of arms to those countries now engaged in armed conflict in the Chaco may contribute to the reestablishment of peace between those countries * * *". The Congress thus attempted to substitute the President's judgment for its own.

2. The going into operation of the state was further conditioned upon an exercise of the President's unfettered discretion, i.e., the making of a proclamation which he was left free to make or not to make as he saw fit . . . "* * * and if * * * he makes proclamation to that effect * * *". The

Congress thus attempted to substitute the President's will for its own.

3. The going out of operation of the statute was also conditioned upon an exercise of the President's unfettered discretion, the making of a proclamation which he was left free to make whenever and for whatever reasons he saw fit . . . "* * * it shall be unlawful * * * until otherwise ordered by the President or by Congress." The Congress thus attempted to delegate to the President a power of repeal coordinate with its own.

4. While the statute should be in operation, the President was given the power, controlled by no standard, to except from and to limit its operation in particular cases and as to particular persons . . . "* * * it shall be unlawful * * * except under such limitations and exceptions as the President prescribes * * *". This was administrative delegation, to whose validity the provision of a standard is essential.

The Joint Resolution, considered as a whole, amounts to an abdication by the Congress of its essential functions which is almost complete, since in each of the four respects outlined above the Congress has attempted to delegate to the executive its essential functions. In neither of the opinions rendered below did the Court notice any but the first-mentioned of them; we apprehend, however, that the Government will not contend that in passing upon the question whether the Joint Resolution invalidly delegates legislative power this Court must close its eyes to all but the particular phrase in the Joint Resolution which the Court below found objectionable.

A. The Congress cannot, under the constitution, delegate to the Executive its function of making laws which may affect our foreign relations.

The Government contends, in effect, that Congress can delegate to the Executive, without restriction, its legislative functions with respect to laws which may affect our relations with foreign nations; the Government's contention necessarily goes to this length, since it relies upon certain early statutes purporting to grant to the President the power, *in his sole discretion*, to put into effect or to suspend the operation of laws prohibiting commercial intercourse with the then warring nations of Europe. (Act of June 4, 1794, c. 41, 1 Stat. 372; Act of June 13, 1798, c. 53, 1 Stat. 565; Act of Feb. 9, 1799, c. 2, 1 Stat. 613; Act of Feb. 27, 1800, c. 10, 2 Stat. 7; Act of April 22, 1808, c. 52, 2 Stat. 490.)

As this Court has pointed out, these statutes "were not the subject of judicial decision." (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388, 422.) All of them were enacted in times of great national stress, when the Congress and the Executive alike are prone to disregard the limitations which Constitution imposes upon them. All of them antedated the decision in *The Aurora* (7 Cranch 382).

The Aurora involved a libel for forfeiture under the Non-Intercourse Act of May 1, 1810 (c. 39, 2 Stat. 605). The going into operation of this statute was conditioned upon the revocation by either Great Britain or France, but not by both of those nations, of certain of their edicts, which were violative of the neutral rights of the United States, it being provided that the happening of this event should be declared by proclamation of the President. This was urged by the claimant in *The Aurora* to amount to a delegation of legislative power to the President. Although the Act of May

1, 1810, like the earlier statutes upon which the Government here relies, bore directly upon our foreign relations, counsel for the United States did not urge that the legislative function of making such laws could be delegated to the President, nor did this Court so decide. The statute was upheld on the sole ground that it was true conditional legislation, dependent solely upon the happening of a definite event, the repeal of certain hostile edicts of foreign nations, and granting no power to the President but merely devolving upon him the duty of finding whether the condition had been fulfilled.

It would thus seem that even at this early date it was not supposed that in this field the Congress possessed an unlimited power of delegation, and this Court has so viewed the matter in later cases.

Field v. *Clark*, 143 U. S. 649;

Hampton & Co. v. *United States*, 276 U. S. 394.

Nor is the Government's contention well-founded that "during the ensuing one hundred and forty years Congress has consistently entrusted the President with similar powers in a field 'cognate to the conduct by him of the foreign relations of the Government' ". With three exceptions, the first of which was preceded by an interval of approximately ninety years, all of the legislative precedents relied upon by the Government were instances of true conditional legislation, i.e., legislation which is to become operative upon the happening of a prescribed event, the task of finding whether or not this event has happened being devolved upon the Executive.

The exceptions are (1) The Joint Resolution of April 22, 1898 (30 Stat. 739), adopted originally as a war measure (as to this see 30 Stat. 364 and also 30 Stat. 738), authorizing

the President in his discretion to prohibit the export of coal or other material used in war; (2) The Joint Resolution of March 14, 1912 (37 Stat. 630) amendatory thereof; and (3) The Joint Resolution of January 31, 1922 (42 Stat. 361) further amendatory thereof.

Proclamations were from time to time issued under these Resolutions, undoubtedly on the assumption that they were valid legislation. This view may have been largely due to a belief that their validity had been established by the decisions of this Court in *United States* v. *Chavez* (228 U. S. 525) and *United States* v. *Mesa* (228 U. S. 533).[1] The constitutional question was not raised, however, in either *United States* v. *Chavez* or *United States* v. *Mesa*, and in neither of these cases were argument had or briefs filed on behalf of the respondents. The Government urges, nevertheless, that "it is implicit in the decisions that the Resolution was constitutional'. Of a like contention, this Court said, in *Webster* v. *Fall* (266 U. S. 507, at p. 511): "The most that can be said is that the point was in the cases if any one had seen fit to raise it. Questions which merely lurk in the record, neither brought to the attention of the court nor ruled upon, are not to be considered as having been so decided as to constitute precedents. See *New* v. *Oklahoma*, 195 U. S. 252, 256; *Tefft, Weller & Co.* v. *Munsuri*, 222 U. S. 114, 119; *United States* v. *More*, 3 Cr. 159, 172; *The Edward*, 1 Wheat. 261, 275-276." Moreover, where constitutional issues are in-

[1] Those decisions were so construed in *Talbott* v. *United States* (208 Fed. 144) and *United States* v. *Lucas* (6 F. (2d) 327).

volved, this Court is not bound even by its decisions rendered after full presentation and deliberation.[2]

Legal Tender Cases, 12 Wall. 457.

We submit that neither these early Statutes nor these recent Resolutions are sufficient of themselves to establish that the separation of powers under the Constitution may be disregarded in this field. They fail to evidence that continued practice and continued acquiescence, which, in the words of the Government's brief (Appellant's Brief, p. 8) reflect a valid exercise of legislative authority. Action under the Resolutions has, in large part, been based upon decisions of this Court which have been taken as establishing their validity, although in those cases the question of their constitutionality was neither argued nor considered, and could not, if the Government's contentions here be well-founded, have been either argued or considered. In each instance, the delegation attempted was identical with that attempted in section 9(c) of the National Industrial Recovery Act (48 Stat. 200), held invalid in *Panama Refining Co.* v. *Ryan* (293 U. S. 388). Unless that decision has no application to legislation which may affect our foreign relations, they cannot be regarded as

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[2] It is noteworthy, moreover, that this contention of the Government is not consistent with the position which it has taken as to the scope of review under the Criminal Appeals Act (34 Stat. 1246, 18 U. S. C. Sec. 682). *United States* v. *Chavez* and *United States* v. *Mesa* were appeals by the United States under that Act from adverse holdings as to the construction of the word "export" in the Joint Resolution of March 14, 1912. If the position taken by the Government (Appellant's Brief pp. 20-22) were sound (which we do not assert or admit to be the case, see *Talbott* v. *United States,* 208 Fed. 144, *United States* v. *Lucas,* 6 F. (2d) 327), the validity of the Joint Resolution of 1912 could not have been passed upon by this Court in either of those cases.

valid precedents for the present legislation. There is nothing in the Constitution which affords any basis for the contention that the power to make laws which may affect our foreign relations may be vested in the Executive instead of in the Congress.

B. The Joint Resolution of May 28, 1934 involves a delegation of essentially legislative functions to the Executive.

1. *The Joint Resolution invalidly delegates legislative power to the Executive, in that its going into operation is made contingent upon the President's determination of a question of legislative policy.*

The Court below held the statute invalid on the ground that the judgment of an executive or administrative officer as to the capacity of legislation to accomplish its avowed object is not a condition upon which its going into operation can constitutionally be made dependent.

By the Joint Resolution, the President is authorized to put the prohibition of the sale of arms and munitions into effect if he concludes that such prohibition may help to re-establish peace in the Chaco. Whether or not a law forbidding the sale of arms is a suitable means by which to bring about this result, the Congress has not undertaken to decide; it has left the decision of this question entirely to the Executive. The statutory inhibition could become operative if, but only if, the President should be of opinion that it might accomplish the desired result, the expediency and just operation of the proposed legislation thus being left entirely to his determination. (See *Field* v. *Clark*, 143 U. S. 649, 693). It is of the essence of the legislative function to determine whether a proposed scheme of laws may tend to bring about a desired result. In the Joint Resolution, the Congress has attempted to transfer to the President the function of making this determination.

By our Constitution, the national legislative power is entrusted to the Congress; essential legislative functions can no more be delegated to the President than to any other grantee (*Panama Refining Co.* v. *Ryan*, 293 U. S. 388, at p. 420).

"The Constitution provides that 'All legislative powers herein granted shall be vested in a Congress of the United States, which shall consist of a Senate and House of Representatives.' Art. I, §1. And the Congress is empowered 'To make all laws which shall be necessary and proper for carrying into execution' its general powers. Art. I, §8, par. 18. The Congress manifestly is not permitted to abdicate, or to transfer to others, the essential legislative functions with which it is thus vested. Undoubtedly legislation must often be adapted to complex conditions involving a host of details with which the national legislature cannot deal directly. The Constitution has never been regarded as denying to the Congress the necessary resources of flexibility and practicality, which will enable it to perform its function in laying down policies and establishing standards, while leaving to selected instrumentalities the making of subordinate rules within prescribed limits and the determination of facts to which the policy as declared by the legislature is to apply. Without capacity to give authorizations of that sort we should have the anomaly of a legislative power which in many circumstances calling for its exertion would be but a futility. But the constant recognition of the necessity and validity of such provisions, and the wide range of administrative authority which has been developed by means of them, cannot be allowed to obscure the limitations of the authority to delegate, if our constitutional system is to be maintained." [3]

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[3] See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, at p. 421.

The distinction which is here pointed out, between *conditional legislation* and *administrative delegation* is fundamental. In administering a general statute, it may be necessary to apply it to a host of different individual cases, for all of which it would obviously be impracticable for the Congress to make particular provisions. In such cases, moreover, the danger that the separation of powers which underlies our system of Government may be broken down is relatively insignificant, since the Congress itself has put the law into operation. Neither of these considerations apply in the case of conditional legislation.

Most of the cases upon which the Government relies in its brief involve only administrative delegation.

Field v. *Clark*, (143 U. S. 649) involved a suit for refund of duties claimed to have been illegally exacted under the Tariff Act of 1890 (c. 1244, 26 Stat. 567). The principal contention advanced on behalf of the plaintiffs was that the Act as a whole was invalid. One of the grounds of invalidity urged was that legislative powers were delegated to the Executive by section (3) of that Act. Section (3) was not directly involved in the suit, but this Court passed upon its validity, without determining whether or not it was inseparable from the remainder of the Act.

Section (3) provided as follows:

> "That with a view to secure reciprocal trade with countries producing the following articles, and for this purpose, on and after the first day of January eighteen hundred and ninety-two, whenever, and so often as the President shall be satisfied that the government of any country producing and exporting sugars, molasses, coffee, tea, and hides, raw and uncured, or any of such articles, imposes duties or other exactions upon the agricul-

> tural or other products of the United States, which in view of the free introduction of such sugar, molasses, coffee, tea, and hides into the United States he may deem to be reciprocally unequal and unreasonable, he shall have the power and it shall be his duty to suspend, by proclamation to that effect, the provisions of this act relating to the free introduction of such sugar, molasses, coffee, tea, and hides, the production of such country, for such time as he shall deem just, and in such case and during such suspension duties shall be levied, collected, and paid upon sugar, molasses, coffee, tea, and hides, the product of or exported from such designated country * * * " at specified rates.

Although in *Field* v. *Clark* this provision was upheld as *conditional legislation*, on the authority of *The Aurora* (7 Cranch, 382), this Court has recognized in later cases that it involved *administrative delegation*, the function exercised being essentially that of rate making (see *Hampton & Co.* v. *United States*, 276 U. S. 394, at pp. 409-410). The Act itself was already in operation, and the task entrusted to the Executive was the application of its reciprocal provisions in particular instances. From this point of view, the reciprocal provisions of the Tariff Act of 1890 seem indistinguishable from the flexible provisions considered in *Hampton & Co.* v. *United States*.

It is apparent that the determination which under Section (3) was to be made by the Executive was more than a mere finding of fact. We believe, accordingly, that, considered as *conditional legislation*, Section (3) was properly characterized in the concurring opinion in *Field* v. *Clark* as extending " * * * to the executive the exercise of those discretionary powers which the Constitution has vested in the law-making department." (143 U. S. 649, at p. 699). But although

the executive was required to evaluate an existing situation in the light of a somewhat vague and indefinite standard, it was not required to determine any question of legislative policy, nor to determine what consequences might be expected to follow from the enactment of a given statute or upon a given course of action. Even from this point of view *Field* v. *Clark* thus affords no precedent for the delegation involved in this Joint Resolution.[4] It follows *a fortiori* that statutes which by their express terms are to become operative upon the happening of certain *events* whose existence as *facts* are to be found by the President or other executive officers (*The Aurora*, 7 Cranch, 382) likewise afford no precedent for the Joint Resolution.

The remaining cases relied on by the Government clearly involved only administrative delegation. Of these cases the following involved the making of subsidiary determinations of fact, in applying a general statutory rule in particular instances:

Jacobson v. *Massachusetts*, 197 U. S. 11;

Union Bridge Co. v. *United States*, 204 U. S. 364;

Mutual Film Corp. v. *Ohio Industrial Comm.*, 236 U. S. 230;

Douglas v. *Noble*, 261 U. S. 165;

Mahler v. *Eby*, 264 U. S. 32;

New York Central Securities Co. v. *United States*, 287 U. S. 12;

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[4] If we believed otherwise, we should be prepared to urge that this Court reconsider its ruling in *Field* v. *Clark*, particularly in view of the fact that what was there said as to the validity of section (3) of the Tariff Act of 1890 might be regarded as unnecessary to the decision of the cause.

Federal Radio Commission v. *Nelson Bros., Co.*, 289 U. S. 266.

United States v. *Grimaud* (220 U. S. 506) involved the making of subsidiary rules to fill in the details of a general statutory scheme and the following cases involved the exercise of the analogous functions of rate-making:

Reagan v. *Farmers' L. & T. Co.*, 154 U. S. 362;

Knoxville v. *Knoxville Water Co.*, 212 U. S. 1;

Louisville & Nashville R. R. Co. v. *Garrett*, 231 U. S. 298;

Hampton & Co. v. *United States*, 276 U. S. 394;

Tagg Bros. v. *United States*, 280 U. S. 420.

There is no case in this Court which upholds a delegation such as that which we are now considering. On the other hand, there is no case in this Court which directly holds such a delegation invalid.

In *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, the Congress had attempted to authorize the employment of a specified means to attain any end the President deemed desirable. In *A. L. A. Schechter Poultry Corp.* v. *United States*, 295 U. S. 495, the Congress attempted to authorize the employment of any means the President deemed suitable to carry out a declared policy. In the present case, the question is for the first time directly presented to this Court whether the operation of a statute can constitutionally be made dependent upon the judgment of an executive or administrative officer as to whether a definitely specified scheme of legislation is a suitable means of accomplishing a desired end.

The Government contends that such a judgment is in essence no more than a finding of all of the complex facts

upon which it would have to be based. We may assume that the Resolution calls for a rational judgment based upon a consideration of such factors, among others, as the Government here enumerates (Appellant's brief p. 11). The Congress might be expected to consider these factors, among others, in making up its mind whether prohibition of the sale of arms was a suitable means by which to bring about the re-establishment of peace in the Chaco. The Congress might therefore be expected to seek advice and information as to such matters from the President and the Department of State, and to take these factors into account in making up its mind whether the proposed legislation would prove effective. The President, also, might be expected to take them into account in determining whether or not to approve the proposed legislation. These and other relevant factors would be, however, only bricks and mortar, essential in arriving at a rational decision but not of themselves determining what that decision shall be; the making of such a judgment amounts to more than merely finding all the facts upon which it as a rational judgment must be based. A determination by the Executive as to whether a given statute may have a tendency to bring about a desired result involves, consequently, not only the determination of a question or questions of fact, but in addition the formation of an opinion as to a matter of essential legislative policy. Conditioning the statute upon such a determination is in effect conditioning it upon the executive discretion as to its wisdom.

See *Panama Refining Co.* v. *Ryan,* 293 U. S. 388, at pp. 416-418;

Schechter Corp. v. *United States,* 295 U. S. 495 at p. 538;

Butler v. *United States,* 78 F. (2d) 1, at p. 7 (aff'd on other grounds, 297 U. S. 1).

We believe that these cases have clearly established the principle that, beyond the zone of mere administrative authorization, essential legislative functions may not be delegated. If this be the true rule, it follows that the Congress may not, under the guise of conditional legislation, make the operation of its statutes contingent upon a "finding" which is, to paraphrase the language of this Court in *A. L. A. Schechter Poultry Corp.* v. *United States* (295 U. S. 495 at p. 538), but a statement of an opinion as to the general effect upon the promotion of the cause of peace between Bolivia and Paraguay of a scheme of laws. To determine whether proposed legislation has the ability to aid in the accomplishment of an avowed object of the Congress is, we submit, of the very essence of the legislative function.

The Government in effect urges, however, that the delegation to the President would be in substance no narrower if the question to be determined by him were what result might be expected to follow if sales of munitions in the United States to Bolivia and Paraguay were to cease and that, accordingly, the Resolution should be read as if it so provided.

Such a delegation would have been substantially narrower, since it would have removed from the President's consideration all questions as to the effectiveness of the statute but it would, nevertheless, have been a delegation to the Executive of essential legislative functions, since the going into operation of the statute would have still been left to rest in the discretion of an executive officer, not effectively controlled.

If the Joint Resolution so rewritten, would have been a valid exercise of legislative power and the President's proclamation in pursuance thereof constitutionally capable of making it operative, then any Act or Joint Resolution modeled upon it will be equally valid and effective in any

field of legislation. Nor need the power which it delegates be vested in the President. In this connection, it is not possible to distinguish between the President and any other grantee. (See *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, at page 421.)

If this were valid legislation, the President or any other executive officer might be given an equal discretion with respect to the operation of any or all of the laws of the United States. Any such law might provide: That it should go into operation of the President or any other officer should conclude that it (or its enforcement or compliance with it) might contribute to the accomplishment of an avowed object of the Congress and if the President (or any other executive officer) should make proclamation to that effect; that while in operation, it should be subject to such exceptions as the President (or any other executive officer) might see fit to prescribe; that it should remain in effect until such time as the President (or any other executive officer) might see fit otherwise to order.

Even within the broad field of legislation which might directly affect our foreign relations, there would, in the Government's theory, exist room for vesting in the Executive a like discretion with respect to many subjects of legislation diverse in their character and some at least fraught with consequences of great moment. If this legislation, having as its avowed object the reestablishment of peace between foreign belligerents, is valid, so also would be similar legislation having any other avowed object. If this legislation delegating congressional power to regulate foreign commerce is valid, so also would be legislation delegating any other of the enumerated powers of Congress, at least so long as the exercise of the power delegated might have a logical connection with the object in view.

The very legislation which is now under review could have delegated the power of the Congress to declare war, without raising any different questions or bringing any different principles into play. General legislation by its terms applying not to one but to a host of differing possible future conflicts might in like manner delegate to the President the power to declare war if in his opinion intervention by the United States on one side or the other of the conflict might contribute the re-establishment of peace between the warring nations.

The Government argues that the finding contemplated by the Joint Resolution is not a matter of opinion merely, but that on the contrary it is an eminently practical question depending upon facts peculiarly available to the President and involving many subsidiary questions of fact which "could not, in practice, adequately have been made (sic) by Congress". (Appellant's Brief, pp. 11-12). The Government, recognizing that this is not all that the legislation commits to the President for his determination, frankly admits that it includes "the determination of the ultimate fact of the *effect* of the prohibition of the sale of arms", and "properly evaluating the constantly changing situation of the belligerents" (Appellant's Brief, page 12). It is then contended that the Resolution clearly indicates the policy which Congress desires to pursue and sets up the standards which are to guide the action of the President (Appellant's Brief p. 14).

If the Government's contention is sound, it is clear that the cases supposed would also involve a determination by the President of (1) the ultimate fact of the effect of armed intervention by the United States, and (2) the evaluation of the constantly changing situation of the belligerents, etc. That this involves opinion and judgment cannot be doubted.

The Government's position must be that a conclusion as to what results will or may follow upon a given course of action, although necessarily involving opinion and judgment, is nevertheless a finding as to an existing state of fact. It is our position that an opinion or appraisal of future effects, when related to action, is a determination of policy and that this is exclusively the function of Congress.[5]

The test must be pragmatic and not dialectic. In the cases supposed, it was the President and not Congress who decided whether this country should go to war. In the case of other statutes which might be patterned after the Joint Resolution, it would be equally the President and not Congress who would decide whether given conduct should or should not be unlawful. It was never intended that Congress should by any device delegate this power to the President by making the law dependent upon his judgment in any respect. The prohibition against unwarranted delegations to the President can make no distinction between legislation generally on the one hand and legislation which may affect our foreign relations on the other, or among legislation which regulates interstate trade and commerce, legislation which regulates foreign commerce, legislation which imposes taxes, or legislation which declares a state of war to exist. All are equally subject to the same standards and the same limitations.

It is no answer to say that the Congress could not be expected so to abdicate its functions or that it must be assumed that any power so delegated would be wisely employed. It is precisely to guard against the danger of such an abdication that the legislative power was confided to the

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[5] The evaluation of the constantly changing situation of the belligerents and of other like factors, although supposedly based on facts, is equally a matter of opinion and judgment.

Congress instead of to the Executive, even though it can be more conveniently and more effectively employed by the Executive.

2. The Joint Resolution invalidly delegates legislative power to the Executive in other respects, not made the basis of the decision below.

A. The Joint Resolution unlawfully delegates legislative power to the Executive, in that it attempts to make its going into operation contingent upon the will of the President.

The statute provides that it shall go into operation "if * * * the President makes proclamation to that effect" (i.e., to the effect that the other conditions to the vesting of the legislation have been fulfilled). His discretion is not entirely unfettered; the statute cannot go into operation unless all the other conditions have been fulfilled; but even if all have been fulfilled, he is under no duty to issue his proclamation unless he so desires. The Congress, in enacting legislation, may provide that it shall go into operation immediately or at a future date. So also it may provide that it shall go into operation upon the happening of some event, and may devolve upon an executive or administrative officer the duty of determining when that event has happened. (*The Aurora*, 7 Cranch. 382). The mere expression of the will of an executive or administrative officer is not, however, a contingency upon which the vesting of conditional legislation may lawfully depend.

Panama Refining Co. v. *Ryan*, 293 U. S. 388.

That is the contingency here.

B. The Joint Resolution unlawfully delegates legislative power to the Executive, in that it attempts to give to the President a power of repeal coordinate with that of the Congress itself.

The provision that the Statute shall remain in operation "until otherwise ordered by the President or by Congress"

is a conditional repeal of the Statute, to take effect if the President declares that to be his will. The going out of operation of the statute is thus made dependent solely on the will of the President, which may not be done under the Constitution.

Panama Refining Co. v. *Ryan,* 293 U. S. 388.

C. The Joint Resolution unlawfully delegates legislative power to the Executive, in that it attempts to give to the President the power to prescribe exceptions and limitations in his unfettered discretion.

In essence, the power to prescribe exceptions is a power to license sales. The power to prescribe limitations may be of the same character, or may have been directed to the making of subsidiary rules and regulations. Both of these are delegations of the power to administer the law after it goes into operation, not to put the law into operation. As instances of administrative delegation, they would have both been unexceptionable, if only a standard had been set up for the President's guidance. In this field, the standard set up need not be very definite.

Mutual Film Corp. v. *Ohio Industrial Comm.,* 236 U. S. 230;

Douglas v. *Noble,* 261 U. S. 165;

N. Y. Central Securities Co. v. *United States,* 287 U. S. 12;

Radio Comm. v. *Nelson Bros. Co.,* 289 U. S. 266;

United States v. *Grimaud,* 220 U. S. 506.

It has never been doubted, however, that the absence of any standard whatever must prove fatal to the delegation since if the administrative officers upon whom the power is devolved are to set up their own standard, they must legis-

late and if they are to abide by no standard, the matter will be determined by their mere arbitrary whim and caprice. If even an indefinite standard, as, for example, the public interest, had been provided, that might be read in the light of the legislative policy and so be made definite; but here the matter is expressly left to the President's unfettered discretion.

POINT II.

THE JOINT RESOLUTION OF MAY 28, 1934, NEVER BECAME OPERATIVE, BECAUSE OF THE PRESIDENT'S FAILURE TO PROCLAIM HIS COMPLIANCE WITH ITS REQUIREMENTS.

Before he could put the Joint Resolution into operation the President was required:

(1) To consult with the governments of other American Republics,

(2) To secure their cooperation, and

(3) To secure the cooperation of such other governments as he might deem necessary.

It was, accordingly, essential to the effectiveness of the President's proclamation that it declare explicitly that he had fulfilled these requirements.

> *Panama Refining Co.* v. *Ryan*, 293 U. S. 388, at pp. 431-433.

What he did declare was that he had consulted with governments of other American Republics and that he had been assured of the cooperation of such governments as he had deemed necessary as contemplated by the Joint Resolution. He did not declare that he had been assured of the cooperation of any other American Republic.

POINT III.

THE PROSECUTION MUST FAIL, BECAUSE THE ACTS CHARGED NO LONGER CONSTITUTE AN OFFENSE AGAINST THE LAWS OF THE UNITED STATES.

It is the general rule that when by reason of a change in the law the acts charged in an indictment cease to constitute an offense, the prosecution must fail unless there is some particular provision of law to save it.

The Irresistible, 7 Wheat. 551;

Yeaton v. *United States*, 5 Cr. 281;

United States v. *Tynen*, 11 Wall. 88;

United States v. *Chambers*, 291 U. S. 217.

Section 13 of the Revised Statutes is not such a provision, since there was here no repealing statute to which it, as a rule of construction, might apply.

POINT IV.

THIS COURT MAY CONSIDER ANY OBJECTION WHICH MAY BE URGED AGAINST THE VALIDITY OF THE JOINT RESOLUTION, WHETHER OR NOT IT WAS DECIDED ADVERSELY TO THE GOVERNMENT IN THE DISTRICT COURT.

The Court has frequently decided that under the Criminal Appeals Act it must accept the construction placed upon the indictment in the court below and will not consider questions going merely to the sufficiency of the indictment as a pleading.

United States v. *Keitel*, 211 U. S. 370;

United States v. *Mason*, 213 U. S. 115;

United States v. *Mescall*, 215 U. S. 26;

United States v. *Kissel*, 218 U. S. 601.

This Court has never intimated, however, that it will not consider any contention falling within the scope of the Criminal Appeals Act which may be urged in support of the judgment. (*Cf. Langnes* v. *Green*, 282 U. S. 531.) On the contrary this Court has, in a number of cases, considered questions which were not ruled adversely to the Government in the Court below. (*United States* v. *Keitel*, 211 U. S. 370; *United States* v. *Shreveport Grain Co.*, 287 U. S. 677). These cases cannot, it is true, be regarded as precedents, since the contention presently urged by the Government was not presented or considered in them, but the very fact that this contention is now brought forward for the first time, almost thirty years after the enactment of the Criminal Appeals Act, is persuasive as to the proper construction of that statute.

CONCLUSION.

THE ORDER APPEALED FROM SHOULD BE AFFIRMED.

Respectfully submitted,

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